

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-03-09

(MANAGEMENT SERVICE DISCIPLINE)

|                      |   |                     |
|----------------------|---|---------------------|
| JENNIFER DUBROW,     | ) |                     |
|                      | ) |                     |
| Appellant,           | ) |                     |
|                      | ) |                     |
| v.                   | ) | RULINGS,            |
|                      | ) | FINDINGS OF FACT,   |
|                      | ) | CONCLUSIONS OF LAW, |
| STATE OF OREGON,     | ) | AND ORDER           |
| PARKS AND RECREATION | ) |                     |
| DEPARTMENT,          | ) |                     |
|                      | ) |                     |
| Respondent.          | ) |                     |
| _____                | ) |                     |

On August 17, 2009, this Board heard oral argument on Appellant's objections to a Recommended Order issued on June 18, 2009, by Administrative Law Judge (ALJ) Wendy L. Greenwald, after a hearing held on February 27, March 12, and March 26, 2009, in Salem, Oregon. The hearing closed after the receipt of post-hearing briefs on April 24, 2009.

Kevin Keaney, Attorney at Law, Portland, Oregon, represented Appellant.

Donna S. Bennett, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On January 26, 2009, the State of Oregon (State), Parks and Recreation Department (Department or OPRD) demoted Jennifer Dubrow (Dubrow), a management service employee, and suspended her without pay for one week. On February 2, 2009, Dubrow filed a timely appeal of the discipline.

The issues presented are:

- 1) Did the Department suspend Dubrow without pay in violation of ORS 240.570(3)?
- 2) Did the Department demote Dubrow in violation of ORS 240.570(3)?

For the reasons discussed below, we hold that the Department suspended Dubrow without pay in violation of ORS 240.570(3), and that an objectively reasonable employer would have issued a reprimand. We also hold that the Department demoted Dubrow in violation of ORS 240.570(3), and that an objectively reasonable employer would have imposed a temporary two-month demotion.

### RULINGS

1. Prior to the hearing, the Department filed a motion to quash a portion of a subpoena duces tecum that requested certain information related to the human resource manager's position description, discrimination/retaliation complaints filed with the Department, and the posting of a human resource analyst (HRA) 3 position. The ALJ correctly denied the motion to quash the subpoena, except as to the names of the applicants for the HRA 3 position. The other information sought by the subpoena was relevant to Dubrow's assertions that the Department failed to give her adequate due process and retaliated against her.

2. As part of the hearing notice, the ALJ ordered the parties to exchange exhibits on February 20, seven days prior to the hearing. On that date, Dubrow requested an extension until February 23, to which the Department objected. Dubrow requested an extension because, in response to a discovery request, she received an extensive number of documents from the Department on February 20. Dubrow asserted that she needed more time to review these documents.

The ALJ properly granted Dubrow's request for an extension. Dubrow demonstrated good cause for an extension. By giving Dubrow additional time to review the documents she received, the ALJ promoted a more efficient hearing process. In addition, the amount of time requested for the extension was reasonable. The ALJ also correctly ruled that the Department could request an extension of time at the hearing if it was prejudiced by the delay. The Department did not request an extension.

3. Throughout the hearing, Dubrow raised relevance objections to the Department's evidence related to events which occurred prior to December 4, 2008. The ALJ correctly overruled these objections and received this evidence. While this evidence is not relevant as to the specific charges upon which the discipline of Dubrow is based,

it is relevant to the issues of Dubrow's notice of what was expected of her at work and whether the level of discipline imposed was appropriate.

4. On May 4, 2009, after the record in this case closed, and before the ALJ issued the Recommended Order, the Department filed a motion to dismiss Dubrow's appeal of the one-week suspension without pay imposed on January 26. The Department noted that Dubrow resigned from employment before this suspension was imposed and contended that the sanction was moot. Dubrow objected to the motion. The ALJ correctly denied the motion. The facts upon which the motion is based are not part of the record, and we cannot consider matters which are outside of the record. *Arlington Education Association v. Arlington School District No. 3*, 177 Or App 658, 34 P3d 1197 (2001). The Department did not seek to reopen the record to introduce any new evidence in support of its motion. In addition, a make-whole remedy merely provides for reimbursement of lost back pay and benefits resulting from the overturned discipline. If the Appellant did not suffer any lost pay or benefits, then no such reimbursement is due.

5. The ALJ's other rulings were reviewed and are correct.

#### FINDING OF FACTS

1. The Department, an agency of the (State), operates the state parks system and special scenic and recreation programs, provides local governments with assistance concerning recreation and heritage conservation, and manages the Oregon State Fair and Exposition Center.

2. Jennifer Dubrow began her employment with the Department on July 10, 2006, as an HRA 3 in the Personnel Services Division, a position in the management service. The Division is responsible for providing Department managers and employees with information and guidance on state and federal laws; state and Department policies, rules, and procedures; and collective bargaining agreements. The Division is also responsible for recruitment and classification of employees, maintenance of employment records, grievance management, disciplinary action, labor relations, personnel-related training, criminal history checks/hearings, and personnel policies and procedures.

3. The HRA 3's duties, as set out in its position description, include assisting managers with employee discipline and counseling; coordinating and conducting investigations; administering personnel actions; and representing the Department in collective bargaining. The position description also lists special requirements for the HRA 3, which include "[a]n ability to develop a cooperative and productive team

focused on customer service and outcomes,” “[e]ffective problem solving skills combined with a directness of communication,” and “[e]xcellent oral and written communication skills.” In her role as the HRA 3, Dubrow also advised, coached, and trained other HRA employees. As part of her training duties, Dubrow had employees shadow her when she performed investigations and other HR tasks.

4. The HRA 3, also referred to as the senior HR analyst, is a part of a series which also includes HRA 1s and HRA 2s. The HRA positions are a subgroup of the HR team, which also includes the positions of HR manager, HR assistant, training and development specialist, and administrative specialist. All HR team members, except for the manager, work in partitioned cubicles in an open area in close proximity to each other. The work area provides employees with no real privacy, and employees are unable to shut out noise or other environmental effects.

5. At the time Dubrow was hired, the Department had two HRA 3s. After Dubrow’s original supervisor left, HRA 3 Gene Schultz became the acting HR manager, while he continued to perform his duties as an HRA 3. In April 2007, Schultz left and Dubrow became the acting HR manager. Dubrow also continued to perform her HRA 3 duties and the Department did not hire another HRA 3 to fill Schultz’s vacant position. While acting manager, Dubrow addressed issues related to HRA 2 EW’s performance.<sup>1</sup> As a result, Dubrow believed that EW began to “trash” her and gossip about her (Dubrow) with TP, another HRA.

Throughout her employment with the Department, TP talked about Dubrow with EW and others once or twice a month, generally in relation to some event that occurred in the workplace. Dubrow felt that EW and TP’s discussions about her escalated near the end of February 2008.

6. In general, Dubrow felt she was able to communicate better by e-mail and it was her preferred method of communication.

7. In May 2007, the Department hired Karen Zimmer as HR manager. Between May and December 2007, Zimmer and Dubrow had a number of conversations about Dubrow’s concerns that the noise level in the cubicle area interfered with her work; that other employees talked too loudly; and that some co-workers, particularly TP and EW, talked and whispered about her and laughed at her. They also discussed Zimmer’s concerns about Dubrow’s relationships and communication with other team members. Sometime around December 2007, Zimmer held a team meeting in which she

---

<sup>1</sup>We have substituted initials for the names of many employees throughout this Order because the identities of these employees are not significant to the issues in this matter.

asked team members to discuss any complaints with the people about whom they were complaining instead of talking with others about their complaint.

8. On March 4, 2008,<sup>2</sup> Zimmer gave Dubrow her performance evaluation, covering the period July 1, 2007 to December 1, 2007. Dubrow met or exceeded expectations in all categories on which she was evaluated. Zimmer included many positive comments in the evaluation. In particular, Zimmer noted that she was able to rely on Dubrow to follow through with assignments; that Dubrow had considerable expertise on HR issues; that Dubrow was willing and able to accept increased responsibility, including taking on the role of acting manager and senior analyst as a new employee; and that customers made positive comments about Dubrow. Zimmer also commented that Dubrow had shown improvement in her relationships with the team, that team members seemed to feel more comfortable speaking in staff meetings, and that she was pleased that Dubrow was working on improving her communications with the rest of the team.

9. Sometime around the middle of March, Zimmer gave the Department notice that she would be leaving in April for a position with another employer.

10. On April 1, Dubrow and Zimmer met to discuss concerns that Dubrow had raised regarding Zimmer's supervision and a prior interaction Dubrow had with Director of Administration Lisa VanLaanen. Zimmer had prepared a written response to Dubrow's concerns, which she brought to the meeting. However, Dubrow told Zimmer that her response was moot since Zimmer was leaving the Department. Consequently, Dubrow did not take the document and Zimmer did not review its contents with her.<sup>3</sup> Zimmer did tell Dubrow that it was critical that Dubrow build a good relationship with the team; that currently Dubrow was not doing this, and that team members did not like her. Dubrow told Zimmer she disagreed with Zimmer's statements regarding her relationship with team members.

11. On April 11, Dubrow sent the following e-mail to EW:

"After listening to yesterday's phone conversations I am reminded, once again, of how much I regret having fought for your job while you were

---

<sup>2</sup>All dates are 2008 unless stated otherwise.

<sup>3</sup>We find that resolution of the conflicting testimony regarding why Dubrow did not get Zimmer's written response is not critical to our decision. We also agree with Dubrow that she cannot be held responsible for the information in the document that Zimmer brought to the meeting since Dubrow never actually received the document.

experiencing issues related to alcoholism, depression, and anxiety. I realize you're never going to forgive my participation in that process.

"Yesterday's passive/aggressive behavior, along with the third-grade behavior that starts up the minute I ask you and [TP] to tone down your loud continuous talking, are unacceptable. I'm putting you on notice that if those kinds of conversations happen again within my ear-shot, I will file a formal complaint. (And for the record, I can hear some of what the person you're talking to is saying, so your cleverly cryptic responses are actually neither. Which is also why you may want to take your fights with your wife to a private room.)

"In no country I've lived in or workplace I've worked in are yours and [TP's] overt rudeness and meanness acceptable. I'd really prefer you continue your normal practice of trashing me behind my back, since it's obvious you're not going to adhere to our team's agreement last year to address issues directly with each other, with involvement of a third-party mediator if necessary."

12. On April 15, EW filed a complaint against Dubrow for violating his protected class status and creating a hostile work environment. The Department hired an independent investigator to investigate the complaint.

13. On May 6, Sharon Frank began work as the Department's new HR manager. Initially, Frank found Dubrow to be positive, friendly, and supportive of Frank as a person, as well as supportive of Frank's plans for the Department.

14. Soon after Frank was hired, she met with HR team members individually. During these interviews, HR staff told Frank about their problems with Dubrow. Team members told Frank that Dubrow yelled at them and that, as a result, they were reluctant to speak in staff meetings. Staff also told Frank that Dubrow was not generally available to answer their questions and often suggested that they make an appointment. When Dubrow and Frank met, Dubrow complained about workspace noise, and also told Frank that EW, TP, and other staff talked and whispered about her. At Dubrow's request, Frank arranged for a private conference room so that HR staff would have a quiet workspace and a place to work on confidential matters.

15. Frank initially found that staff meetings were uncomfortable and stilted, HR staff members were not very communicative, and the meetings were not conducive to a team environment.

16. On May 30, Frank issued Dubrow a letter of reprimand resulting from the investigation of EW's complaint. Since Frank had not been present during the events mentioned in the disciplinary action, she relied on the information she obtained from Department Director Tim Wood and the investigator in preparing the disciplinary action. The letter of reprimand stated in part:

"BACKGROUND

"\* \* \* \* \*

"You are the senior/lead staff person of the nine-member Human Resource Section. In this role, you are responsible for providing assistance and coaching to your team members and creating a positive workplace. Your position description requires the ability to develop a cooperative and productive team focused on customer service and outcomes. It is also important to display effective problem solving skills and effective communication skills. Ideally, as a senior member of the Human Resource Section you would be a model of human resource professionalism.

"FACTS SUPPORTING THIS ACTION:

"On April 1, 2008, you were counseled by your former manager, Karen Zimmer, regarding her expectations of you to work collaboratively with the Human Resource team. You were advised that you must set the example of cooperation and teamwork by being respectful and receptive to them when they come to you for assistance. You were advised to speak to your coworkers with respect and provide leadership and assistance when they ask for your help or when you see that they are struggling with something. Your manager advised you that she was concerned about your interaction with the team and wanted to be sure that you clearly understood her expectations of you. Your manager acknowledged you as a valued member of the team and that you have responsibility to make sure that you are working positively and cooperatively with the team.

"On April 15, 2008, a formal complaint was filed against you, to OPRD Director Tim Wood, by your coworker [EW]. The complaint states that you violated [EW's] protected class status and have created a hostile workplace due to your communication with him and the Human Resource Team.

“The complaint was investigated by an independent investigator. You participated in the investigation. The results of the investigation identified areas of performance that are unbecoming of an OPRD management team member. The evidence demonstrates that you have created an intimidating and hostile work environment via your written (email) and verbal communications with staff and your manager. You have repeatedly taken employees aside and scolded and criticized them. That is contrary to your job duties and to the concept of teamwork. Your interaction with [EW] regarding his protected class issue was unacceptable and violated department and state discrimination and harassment policy. Your coworkers are fearful of you; you inappropriately withhold information preventing the team to move forward on issues; you have yelled at them for their behavior, but take no responsibility for your own. Most damaging is your practice of holding yourself out as an example of what a human resource professional should be. But your behavior and its result tell a very different story.

“As a member of the Human Resource Section, I expect you to keep me informed, keep your on-line calendar, telephone, and out of office systems current. You are directed to maintain a predictable and set schedule. If you are ill or need to be out of the office, let me know prior to the start of the shift. Most important of all you must be a team player, contribute to a positive and productive work environment; and maintain professional and collaborative working relationships with all contacts.

“SUMMARY:

“The role of human resources is to be a consultant, to coach and counsel management and non-management staff in workplace issues. Your personal interactions with your coworkers and managers needs to improve and reflect the very behavior you advise others. This behavior is positive, constructive, collaborative, and productive to a team environment.

“I believe this is within your ability to attain. The choices you make will determine if you are successful in meeting the stated expectations.”

17. On May 30, Dubrow notified Frank by e-mail that she would not appeal the reprimand. Dubrow included a rebuttal to the reprimand with her e-mail, and asked that Frank attach it to the reprimand in her personnel file. The rebuttal set out Dubrow’s objections to the reprimand. Among the objections Dubrow made to the

reprimand were; (1) until she received the reprimand, Dubrow was unaware that team members felt she scolded, criticized and withheld information from them; (2) the investigation into EW's complaint was not fair or thorough because Dubrow was never interviewed regarding other team members' complaints or asked about the April 1 meeting with Zimmer; and (3) the Department had failed to properly investigate or discipline other managers who behaved inappropriately in the workplace or created a hostile work environment. Dubrow also questioned whether EW was in protected class status and raised concerns about Zimmer's failure to address Dubrow's prior reports of hostile workplace behavior by team members. Dubrow concluded that

"[r]egardless of the violation of just cause standards, I am deeply concerned about team member perceptions of me and my work/communication style, as outlined in the LOR [letter of reprimand]. It was especially shocking and saddening to hear you relay [LE's] concerns because I thought we had a really good working relationship and had ironed out any communication issues. (If I had known how she truly felt about me and our interactions, I wouldn't have volunteered her name to the investigator as someone to talk to.)

"I am fully committed to taking responsibility for my part in the conflict, communicating professionally, working collaboratively and cooperatively with and repairing relationships with team members, and working on my humility.

"Life is a series of mistakes, each with the opportunity to learn and grow in wisdom and compassion. With a new manager and new beginning, I believe we can all reach for the best in ourselves, accept responsibility for our actions, forgive, and put the past behind us."

18. Frank placed Dubrow's rebuttal in her personnel file as requested. She also took Dubrow's commitment to be a better team member seriously. Frank observed that Dubrow acted as a better team member for a short period of time, but that Dubrow subsequently began to set herself apart from the rest of the team. For example, at most staff meetings, Dubrow sat away from the table at which the group met, suggesting that she did not want to be included in the group.

19. On July 3, Dubrow became very upset when she was unable to find her personnel file in the HR file drawer, to which all HRAs had access. Dubrow sent Frank an angry e-mail, in which she accused Frank of keeping the file to signal to the other HR staff that she [Dubrow] had been reprimanded. In her e-mail, Dubrow reviewed the reasons why the reprimand had been inappropriate and said that the entire process showed her how easy it was to violate an employee's rights. Dubrow concluded:

“I can use this experience to better learn how to forgive from the spirit of the heart rather than the spirit of judgment. And I can use this experience to accept responsibility for my communication/work styles and modify them to ensure better team relationships, even though other team members continue to avoid responsibility for or modify their own communication/work styles. I’m just disappointed at how this played out and continues to play out.”

20. Frank was surprised and upset by Dubrow’s e-mail because she thought they had developed the kind of relationship in which Dubrow would bring concerns directly to her. Rather than respond to Dubrow by e-mail, Frank talked with her in person. Frank asked Dubrow why she had sent the e-mail. Dubrow responded that she felt Zimmer had not resolved matters and the investigation was flawed and unfair. Frank told Dubrow that she made inaccurate assumptions in the e-mail and that in the future, Dubrow should bring such concerns directly to her. Frank also told Dubrow that she had thought that things were going well and that staff were getting along until a July 2 meeting in which Dubrow snapped at EW. At first, Dubrow told Frank that she did not remember what she said to EW; after further discussion, she admitted that she may have spoken critically to EW at the meeting. Dubrow told Frank that she did not feel that other staff members were allowing them to move on and that people still talked about her behind her back. Frank had not observed others talking about Dubrow.

21. In August, the Department hired Myra Gibson, a private facilitator, to work with the HR staff on their problems. The Department hoped that with the assistance of the facilitator, the team would arrive at a commitment to work together, and to be more cooperative and productive. Gibson began by meeting individually with each team member. The Department then arranged for Gibson to facilitate an all-day team retreat at an off-site location. The group did reach some agreements during the retreat, including commitments to work together, be cooperative, and be more productive.<sup>4</sup>

22. After the retreat, Frank observed that the HR team acted more like a team. For example, team members participated in meetings and interacted more with each other. However, around November, Dubrow complained to Frank that staff members

---

<sup>4</sup>The Department cited Dubrow’s unexpected announcement at the retreat that she would not be joining the other participants for the group lunch as an example of the problems she had with her co-workers. However, there is no evidence that the Department ever discussed its concerns about this with Dubrow and it is not referred to in the discipline letters. Therefore, this evidence is not relevant to this appeal.

were not completing projects and were talking about her. To address Dubrow's concerns, Frank allowed Dubrow to work at home on occasion. Frank and Dubrow continued to discuss their concerns. In particular, they talked about Dubrow's relationships with the other team members.

23. For approximately six weeks prior to December 4, Frank worked on revising position descriptions and redistributing the HRA workload. During this time, Frank met with each of the HR analysts to discuss the HR organizational chart and better workload distribution. The analysts all had the opportunity to provide input on the organizational structure and their assignments. When Dubrow met with Frank, she did not raise any concerns about her proposed assignments and even volunteered to take one of the Department's most difficult assignments, which had been given to TP. Based on these discussions, Frank concluded that Dubrow found her proposed list of assignments acceptable.

24. On December 4, Frank met with the HR analysts, including SK, TP, EW, and Dubrow, to present her draft of the new organizational structure and assignments. When Dubrow arrived, she turned her chair away from the group and positioned it facing Frank because she believed this would make her comments less intimidating. However, other team members believed she was setting herself apart from them, as she had done in the past. At the beginning of the meeting, Frank passed out two handouts that listed each HRA's proposed assignment and provided a breakdown of the FTE (full-time equivalency) and customer numbers by regions or locations for each assignment. Frank then explained why she had made these assignments, and discussed her proposal to reclassify EW into an HRA 3 position, so there would again be two HRA 3s. Frank also talked about her proposal to provide development opportunities for TP, SK, and AA, which would allow them to do out-of-class work for which the Department did not currently have funds. Under the assignment redistribution, Dubrow and EW each had 9 or 10 major areas of assignment and the others had significantly fewer.

After she saw the other HRAs' assignments, Dubrow became so angry that her face turned red. She asked how the work would get done since her assignment was bigger than the others. Frank, who was surprised by Dubrow's objections, responded that she had attempted to fix the problem by basing assignments on FTE. When TP stated that she was excited to get Region 4 because this was her favorite region, Dubrow responded that TP was excited because no one in Region 4 ever called for assistance. TP felt that Dubrow was criticizing her competency. At one point in the meeting, Dubrow referred to the HRA 1 and 2 "classes," and asked where they would get the skills or training needed to do the investigations and other work that Frank envisioned them doing. Dubrow made specific reference to TP's lack of the necessary skills.

During the meeting, Dubrow continued to aggressively and repeatedly pursue her concern about the workload distribution. As a result, the atmosphere in the meeting became tense. At one point TP asked if Dubrow had concerns about her workload, why she did not ask for help. TP stated that she and EW sometimes helped each other when they had too much work. Dubrow responded that she could not ask for their help because they did not always deliver on projects and she did not trust them to complete any work that she might give them. When EW suggested that TP do training, Dubrow pointed out that an HRA 2 level does employee development, not organizational development, and that she was concerned that TP lacked the experience to do organizational development on her own. TP began to feel that it was useless to make suggestions, because every time she did, Dubrow responded by criticizing her and the other team members. TP was particularly embarrassed because Dubrow made these criticisms in front of Frank, their supervisor. Previously Dubrow had always criticized TP and other team members in private. At one point in the meeting, TP stopped contributing to the discussion.

At some point, Dubrow asked if Frank could move Region 1 off of her list. EW then volunteered to take Region 1. However, Dubrow objected to EW's suggestion because EW already had a large assignment; in addition, she believed that EW consistently failed to deliver on projects. Dubrow proposed that TP take Region 1. When Frank asked TP if she was willing to take another assignment, TP did not immediately respond. After Frank asked again, TP replied that she would do whatever work Frank assigned her. Frank concluded the meeting by telling the analysts that she would consider their input.<sup>5</sup>

25. After the meeting, Dubrow went to Frank's office and apologized for her behavior during the meeting, explaining that she knew she would probably pay for it. Dubrow feared that as a result of the meeting, she would once again be the subject of gossip and whispering. Dubrow said she was frustrated because of her heavy workload

---

<sup>5</sup>Dubrow testified that she did not use the word "class," make hurtful or demeaning statements about others, or describe herself as better than the other employees during the December 4 meeting. However, the other employees and Frank testified consistently that Dubrow directed some of her comments at specific employees, questioned the skills of other employees, aggressively and repeatedly pursued her issues, and made demeaning comments about TP. In addition, it is clear from the evidence that Dubrow did not always understand the impact on others of what she said and how she said it. Dubrow admitted that her perception of events often differed from that of her co-workers. Therefore, we find that it is more likely that the meeting events occurred as testified to by the other employees.

and because she could not get help. Dubrow also admitted to Frank that she probably said too much.

26. After their conversation, Frank and Dubrow exchanged several e-mails. Among the topics they discussed were Dubrow's recipe for a potato dish and the FTE numbers Frank used to make the HRA assignments. Dubrow told Frank that she thought that the FTE numbers Frank had used were incorrect and suggested a different workload distribution.

27. On December 5, TP and EW complained to Frank about Dubrow's behavior at the December 4 meeting. TP said that Dubrow attacked her. Frank was upset with Dubrow's conduct at the meeting because of the way in which Dubrow had talked to and about the other employees, the effect of Dubrow's comments on the other employees, and Dubrow's failure to tell Frank, before the meeting, that she was unhappy with her assignments.

Also on December 5, Frank talked to VanLaanen about the December 4 meeting. As a result of this conversation, Frank decided to consult with the Department of Justice to determine what to do about Dubrow's behavior at the meeting.

28. On December 8, Dubrow complained to Frank that EW was speaking critically about her to one of Dubrow's customers. Dubrow said that she heard EW tell the customer that TP had been ambushed. Dubrow told Frank she believed that EW then pointed at her, although she admitted she did not actually see him do this.

29. On December 9, Frank talked to Dubrow's customer about the conversation with EW. The customer said that she had asked EW whether TP was not at work because the Oregon State University team lost a football game. EW jokingly told the customer that the team got ambushed and TP could not handle it. Both EW and the customer laughed at this and continued to joke about it. The customer explained that neither he nor EW said anything about Dubrow during their conversation.

30. On approximately December 10, Dubrow filed a complaint against the HR team and HR executive assistants, including EW, TP, AA, CH, KR, VD, and LT, for ongoing harassment, discrimination, and creating a hostile work environment. Dubrow also alleged that her co-workers violated state-wide policies concerning violence in the workplace. Dubrow had previously filed several other complaints against her co-workers and supervisors, which the Department had investigated and resolved. Dubrow based this complaint on the daily behavior of the HR team and executive assistants. Specific incidents mentioned in her complaint were: (1) verbal abuse by EW and TP in 2007 about which Dubrow complained in July 2007 and to which Zimmer responded at a

November 2007 meeting by setting team expectations; (2) continued negative behavior which Dubrow reported to Zimmer in December 2007 and January 2008, which Zimmer failed to address; (3) the April 2008 incident with EW, which resulted in Dubrow's letter of reprimand; and (4) EW's discussion with Dubrow's customers on December 5. Dubrow asserted in the complaint that management had a history of ignoring or failing to investigate prior reports of harassment and hostile work environment.

31. The Department hired Carlos Rebelez, an independent investigator, to investigate Dubrow's complaint. Frank decided to duty station Dubrow at home on paid leave during the investigation of the complaint instead of placing the seven HR staff members who were the subject of the complaint on administrative leave. In making her decision, Frank considered Dubrow's past willingness to work at home on projects.

32. Around 4:00 p.m. on December 15, Frank and VanLaanen met with Dubrow to tell her that she was being duty stationed at home on paid administrative leave. Frank told Dubrow that this was not discipline, but that she wanted the complaint to be investigated in a professional manner. She explained that if Dubrow worked at home, she would be in a safe situation and would not face the hostile work environment about which she had complained. Frank told Dubrow that while duty stationed at home, she was to work on the field reallocation project and the Rooster Rock disciplinary investigation. When Dubrow told Frank she was worried about what people would think if she was not in the office, Frank told her to change her messages to say that she was working at home on the reallocation project.

Frank provided Dubrow a written notification of her status, which stated:

"You will continue to work on the field reallocation project from home. You will be required to be available by phone between 8:00 a.m. and 5:00 p.m. for Department questions or contacts. Do not come to the offices or property without advance notice and approval from me. At the conclusion of the investigatory interviews you will be informed of the information gathered and offered an opportunity to provide comments and information.

"Your adherence to this directive is appreciated. I will contact you as quickly as possible to inform you of the status of the investigation and when you can meet with the investigator. If you have any questions or concerns about this letter, the investigation or subsequent inquiries, do not hesitate to contact me at your convenience." (Emphasis in original.)

33. Over the past several years, the Department has placed at least three employees who were the subjects of complaints on paid administrative leave and duty stationed them at home during the investigation. Two of these employees were required to perform work during this time, while one was not. The Department had not previously required the person who filed a complaint to be duty stationed at home during an investigation.

34. The Department uses the Groupwise e-mail system. All Department employees have remote access to their Groupwise account, which allows employees to access their work e-mails from home or other locations outside of the Department.<sup>6</sup> A person sending an e-mail within the Groupwise system can determine if an e-mail has been delivered and opened by checking the properties of the sent e-mail. However, if the e-mail is sent outside of the Groupwise system, the sender cannot determine if the e-mail has been opened.

35. On December 16 and 17, Frank and Dubrow exchanged the following e-mail string of communications over the Department's e-mail system:

(A) Frank e-mailed Dubrow with questions about what had occurred at the December 4 meeting.<sup>7</sup> Frank asked Dubrow to explain

“what you hoped to accomplish by your statements about the others work, specifically [TP], and how you perceive [TP] accepted the message?

“Do you believe your behavior fostered a team work environment? If you reflect back on the meeting how could you have handled the situation differently?”

(B) Dubrow responded to Frank that prior to the December 4 meeting, she told Frank her concerns about her workload. Dubrow explained that she believed the failure of other team members to complete projects and EW and TP's continuous gossiping during the work day negatively affected customers. She said that she had hoped Frank would have considered this when making the assignments. Dubrow told Frank that she

---

<sup>6</sup>Dubrow stated twice in her post-hearing brief that she could not respond to Frank's e-mails because she did not have access to her work e-mails while working at home. (Appellant's Closing Argument at 6 and 8-9.) However, this is inconsistent with the evidence that Dubrow did respond to work e-mails from home and Dubrow's own testimony that she could have, but did not, access her e-mail account.

<sup>7</sup>While Frank referred to a December 9 meeting in the e-mail, it is clear she was actually asking about the HRA team meeting on December 4.

apologized to Frank after the December 4 meeting for bringing up the workload issue because Frank's reaction showed that she [Frank] obviously had not wanted to discuss it. Dubrow said she never intended to apologize to Frank for saying too much at the meeting or for speaking too critically of other team members. Dubrow also told Frank that: (1) she was frustrated during the meeting; (2) she was disappointed after the meeting when Frank said she did not want to overload TP, who had significantly fewer assignments than Dubrow; (3) she was worried that TP would complain about her after the December 4 meeting, and told Frank about her fear; (4) upon reflection, the only thing she could have done differently was to use questions instead of "I" statements; (5) she was disappointed in Frank's final assignments; and (6) if Frank did not think the team was healthy enough to have the conversation in the December 4 meeting, she should have told Dubrow this before the meeting and, as the manager, should have handled the meeting more appropriately. Dubrow concluded by asking Frank to ensure that she would be involved in the investigation of her complaint prior to its conclusion.

(C) Frank acknowledged receipt of Dubrow's e-mail, but told Dubrow she did not necessarily agree with it.

(D) Dubrow responded to Frank that she was concerned about the stigma of being placed on paid administrative leave, lacked confidence that her status would be kept confidential, and wanted to be involved in the investigation process. She also stated that placing the complainant on leave and requiring her to perform work while on leave was contrary to the common practice. Dubrow notified Frank that regardless of her concerns, "I will continue working on the reallocation project and Rooster Rock investigation disciplinary documents at home and will stay contactable between 8 am-5 pm." Dubrow also told Frank she had "changed my messages for customers to contact [EW]."

(E) Frank responded to Dubrow that it was easier to place Dubrow on leave than the rest of the Department; that she [Frank] did not believe there was a stigma attached to paid administrative leave; that Dubrow's situation would be handled with discretion; and that because a public agency could not make a gift of salary, employees placed on paid leave were commonly required to work. Frank also reminded Dubrow to complete the assignments she had been given and confirmed that one assignment was to work on the field reallocation project. Frank thanked Dubrow for changing her voice message.

36. While on leave, Dubrow was unable to do much work because she felt stressed and depressed about being placed on leave. Dubrow was concerned that her relationships with her customers would be damaged because they would perceive that she was under investigation. Due to the cold weather during the time she was on paid

leave, Dubrow's house was cold; at one point, her pipes froze. Dubrow listened to the recordings of the five or six interviews she had conducted during the Rooster Rock investigation, reviewed employee's files, and took notes to prepare the disciplinary letters. She did not, however, prepare the letters. Dubrow knew this was a time-sensitive matter. Dubrow also compared reports for the field reallocation project, but then stopped work on the project. Dubrow knew that this was a crucial project that needed to be completed as quickly as possible. Dubrow did not contact the Department when she stopped work on the projects or when she felt too ill to work. Dubrow believed that Frank had her own reasons for placing Dubrow on leave and had made it clear that she did not care if Dubrow's image was damaged. At some point, Dubrow made a handwritten note that she had "[c]ontinued working on projects when not ill (migraines, depression, stress)."<sup>8</sup> Dubrow remained available by phone throughout the leave.

37. On December 18, Dubrow accessed her work e-mail from her home computer and sent Investigator Rebelez an e-mail and attachments related to the investigation of her complaint. After sending this e-mail, Dubrow did not access her work e-mail further during her administrative leave.

38. On December 23, Frank sent Dubrow an e-mail at her work e-mail address asking for a status update on the field reallocation project.

39. On December 26, Frank sent Dubrow another e-mail at Dubrow's work e-mail requesting an update on the field reallocation project by December 29.

40. On December 30, Frank sent an e-mail to Dubrow at her work e-mail address regarding Dubrow's failure to respond to her December 23 and 26 e-mails, and stated further:

"In an earlier email, you stated that you did not have to work at home because you were on administrative leave. I reminded you that you were on paid administrative leave and, as such, you were given an assignment that you could complete at home. Despite my request for an update on your progress, I have not heard back from you.

---

<sup>8</sup>We do not find credible Dubrow's testimony that the reason she stopped working on the projects was her lack of access to the Department's database. Dubrow's own notes do not include this as a reason, she did not include it in her pre-discipline response, and she raised it for the first time at the hearing. We find it more likely than not that she stopped working as a result of her depression, anger, and stress from being placed on leave.

“Please realize Jennifer, that you are being directed to complete the project and provide updates as requested while you are being paid to be at home. This is a direct order. Failure to comply with this directive will be viewed as insubordination that may result in discipline. You are not being paid to stay at home and do nothing. If that is your desire, you may use this time away from work as vacation and deduct it from your accrual. And, accordingly, I will expect you to enter vacation on your time sheet.”

41. By letter dated December 31, Department Director Wood notified Dubrow that as a result of the investigation, the Department determined that she had failed to allege facts in her complaint that proved she was the victim of harassment, discrimination, disrespectful behavior, violence, acts or threats. Wood notified Dubrow that the Department considered the matter resolved, that she was no longer on paid administrative leave, that she should report to work the day after she received the letter, and that she should notify Frank when she would return to work.

42. Dubrow received Wood’s letter on Friday, January 2, 2009. She decided to call Frank that weekend to notify her that she would return to work on Monday, January 5. However, Dubrow was injured over the weekend. On Sunday, January 4, Dubrow left a message on Frank’s voice mail that she would not be returning to work on Monday because she was going to the doctor for treatment of an injury.

43. On January 5, 2009, Frank received Dubrow’s voice message, but decided not to follow up because she expected Dubrow would return to work the next day. That day, Frank mailed Dubrow a letter demoting Dubrow from her HRA 3 position to an HRA 2 position effective immediately.<sup>9</sup> Sometime after 4:00 p.m. on January 5, Dubrow left Frank a voice message that she would be out on leave under the Family Medical Leave Act (FMLA). Dubrow knew that Frank worked from 7:00 a.m. to 4:00 p.m.

44. During the day on January 6, 2009, Frank left messages on Dubrow’s home and cell telephones that she needed to talk to Dubrow that day. Frank also mailed Dubrow a disciplinary letter suspending her without pay for one week for failing to respond to Frank’s attempts to contact her or provide any information regarding the

---

<sup>9</sup>The contents of this demotion letter are not set out here because the Department rescinded this letter and on January 26, issued a new letter demoting Dubrow. (Finding of Fact 50). The contents of these two letters are virtually identical; the only difference is that the January 26 letter offered Dubrow a pre-disciplinary meeting to refute the charges and present mitigating circumstances before the Department made a final decision to demote her. The January 5 letter offered no such meeting.

work she had accomplished while duty stationed at home.<sup>10</sup> Sometime after 4:00 p.m., Dubrow left a message on Frank's voice mail. Frank called Dubrow back that evening and left another message asking Dubrow to call her.

45. On Wednesday, January 7, 2009, Dubrow telephoned Frank and told Frank that she would be out on FMLA leave. When Frank asked whether Dubrow had worked on the Rooster Rock and field reallocation project assignments, Dubrow stated that she had worked on the two projects, but that she had not completed them. With Dubrow's permission, Frank went to Dubrow's house that day and picked up the Department materials Dubrow had taken home, including a thumb drive.

46. Frank looked through the materials Dubrow had given her and concluded that Dubrow had done no work on the field reallocation project. The Department hired a temporary employee to complete the work on that project. When the temporary employee looked at the material Dubrow had provided to Frank, which included a thumb drive, she found that the last date any of the files on the thumb drive had been changed was December 16.

47. On January 9, 2009, the Department posted an opening for an HRA 3 position. Sometime prior to this, EW had notified the Department that he would be leaving because he had taken a position in another agency. Although EW's position had not yet been reclassified as an HRA 3 position, the State Department of Administrative Services (DAS) gave the Department permission to post the vacant position as an HRA 3.

48. On January 13, 2009, Frank sent Dubrow separate letters that rescinded and replaced the January 5 demotion letter and the January 6 suspension letter. The letters notified Dubrow that the Department was considering implementing a demotion and a one-week suspension without pay, set out the basis for the proposed disciplines, and indicated that a pre-disciplinary meeting had been scheduled on January 22, 2009, at which time Dubrow was entitled to appear to refute the charges and present mitigating information.

49. On January 21, 2009, Dubrow notified the Department that she would not be appearing at the pre-disciplinary meeting and provided a written statement in

---

<sup>10</sup>The contents of this suspension letter are not set out here because the Department rescinded this letter and on January 26, issued another letter suspending Dubrow. (Finding of Fact 5 i.) The contents of these two letters are virtually identical; the only difference is that the January 26 letter offered Dubrow a pre-disciplinary meeting to refute the charges and present mitigating circumstances before the Department made a final decision on the suspension.

response to the proposed demotion and suspension. In regard to the proposed suspension, Dubrow stated that she had been available by phone as directed, had worked on the assigned projects during the paid administrative leave period, and had not received Frank's e-mails. In regard to the proposed demotion related to the December 4 meeting, Dubrow stated, among other things, that she had expressed concerns about her workload to Frank prior to the meeting; that she understood that the meeting was to discuss workload distribution; that she attempted to express her concerns in a non-threatening manner by not looking at or naming individuals when she criticized other team members; and that she told Frank after the meeting that she would pay for her part in the meeting by enduring weeks of TP whispering.

50. On January 26, 2009, the Department notified Dubrow that effective January 5, 2009, it was demoting her from an HRA 3 to an HRA 2. The disciplinary notice provided:

**"FACTS SUPPORTING THIS ACTION:**

"Over the past month, Ms. Frank has talked with each of the HRA's about job assignments, the opportunity for personal growth, matching experience with organizational needs, an opportunity to provide field experience, and meet a new organizational need in human resource information - reporting capability. During these meetings with Ms. Frank you were very supportive of the reassignments; in fact, you volunteered for the State Fair assignment.

"On December 4, 2008, you participated in a Human Resource Analyst (HRA) team meeting. Present at the meeting were you, Ms. Frank, [SK], [TP], and [EW]. The purpose of the meeting was to discuss the new position descriptions and the reassignment of the HRA's. The reassignments, distribution of work, and rationale for each were explained.

"During the meeting you positioned yourself away from the other team members. You were red-faced and did not make eye contact. You made several comments that were hurtful; demeaning, and inferred a 'class' system between the HRA's. You complained that your anticipated and actual assignments were larger/heavier than the others. You indicated that [TP's] assignment was light compared to the others. You also indicated that your work load and your higher level of work were overly burdensome. You stated that you could not ask for help because you could not rely on the others to complete the assignments in a timely fashion.

“During the meeting you used gestures and language that were dismissive and demeaning of your colleagues’ work contributions. You inaccurately stated that the lower level staff does not have the experience they need to conduct investigations and effectively do their jobs.

“After the meeting, you went to Ms. Frank’s office. You said that you were sorry for the role that you played in the meeting and your communication. You explained that you are frustrated that the workload is not evenly distributed; [TP] talks too much and has a lighter work load; [EW] does not complete his work and you have to pick it up. You acknowledged your poor conduct by saying that you would probably have to ‘pay’ for the way that you handled yourself during the meeting. You expressed frustration that you have had to continually pick up the work of others who don’t follow through, talk too much, and the inequities are unfair.

“Ms. Frank listened to you and said that she would need time to consider what you presented.

“On December 5, 2008, [TP] told Ms. Frank that she felt attacked, again, by you, and that you were rude and intimidating. [TP] indicated that she was upset by the meeting, felt the criticism was directed at her, and, in the meeting, she was close to tears. [TP] wondered, if your workload was so burdensome, why you did not ask for help rather than wait and attack the staff after the fact.

“[EW] also spoke to Ms. Frank about the meeting and your behavior. He stated that you are hostile, intimidating, and your behavior was inappropriately directed at [TP]. He pointed out that in your effort to create a ‘class’ system, you failed to recognize you are the senior member. You should be the leader and set a helpful and positive example.

“On December 16, 2008, Ms. Frank sent you an email which stated in part, *‘I think it is important to understand what happened and why. You apologized to me for your role in the communication at the meeting. You indicated that you were frustrated and probably said too much. You indicated that the workload is too much, you have historically carried more than anyone else, and that the others did not do their fair share, nor trained to do the higher level work.*

“Ms. Frank instructed you to respond to the following questions: 1) *Could you share with me what you hoped to accomplish by your statements about the others [sic] work, specifically [TP], and (2) how you perceive [TP] accepted the message?* 3) *Do you believe your behavior fostered a team work environment?* 4) *If you reflect back on the meeting how could you have handled the situation differently?”*

“Rather than respond to Ms. Frank’s questions about your behavior, you continued to express frustration at your workload. You ignored your professional responsibility for creating a professional and collegial work environment and continued to criticize others for their failure to perform to your standards.

“You justified your hurtful destructive behavior by acknowledging the impact you had on [TP] and the others in the December 4<sup>th</sup> meeting but that the team should be healthy enough to handle direct conversations. You equivocated enough to say that you should not use ‘I’ statements and, instead, ask more questions. You tacitly admitted that your behavior was out of line by noting that you were going to pay for it. While you acknowledged there would be repercussions, you failed to take any responsibility for the [sic] creating the environment of which you are now so critical.

“\* \* \* \* \*

“SUMMARY:

“Jennifer, your behavior is not conducive to the senior leadership position you hold within the OPRD human resource team. Your contributions do not create a positive and healthy team experience. You use your seniority to berate and diminish those that you should be training and mentoring. Your role within human resources is to be a consultant, to coach and counsel management and non-management staff on many of the very skills that you are unable or unwilling to exhibit. Your personal interactions with your coworkers and managers must mirror the very behavior you advise others. This behavior is essential in creating a positive, constructive, collaborative, and productive team environment.

“At the present time, you are not helpful and supportive of the human resource team. You perceive and assume the worst in others, let issues build up, and attack your coworkers. You assume they are mad at you, intentionally bring in meat-stench lunch just to annoy you, and that they

harbor ill will toward you. Your behavior is contrary to the team agreement to create and maintain harmonious and productive work relationships. You are the most senior and the leader among the human resource team but your behavior does not match your status.

“Jennifer, this demotion is a result of your inability or unwillingness to change your behavior and interactions with your team. Despite previous counseling and discipline, you have continued to create an environment that is not conducive to a healthy team. You become angry because you perceive and assume that others are not doing their jobs, you make accusations based on inaccurate perceptions and then when situations become destructive, you take no responsibility for your conduct. Most damaging is your practice of holding yourself out as an example of what a human resource professional should be. But your behavior and its result tell a very different story.

“This demotion is a serious action on the part of OPRD. It is your responsibility to now change your behavior. I advise you to reflect on your past conduct and contemplate how it impacts your co-workers, the goals of the human resource team and your own professional growth. I encourage you to attend any available classes or seminars on communication and team building. The OPRD contract with Cascade Centers is also available to you for assistance.

“I expect you to work toward positive change. Failure to improve your communication skills and to work collaboratively with your co-workers will result in further disciplinary action, up to and including dismissal.”  
(Emphasis in original.)

51. By a second letter dated January 26, 2009, the Department notified Dubrow that she would be suspended without pay for one week upon her return to work. The letter provided in part:

**“FACTS SUPPORTING THIS ACTION:**

“On December 11, 2008, you filed a formal complaint of harassment, discrimination, and hostile work environment. The Department of Justice was immediately contacted and an investigation was initiated.

“On December 15, you were duty stationed at home while an investigation into your complaint could be conducted. As you were notified, having you

work from home was NOT disciplinary but a routine step often taken to ensure the integrity of an investigation and to make certain that the matter can be handled expeditiously. While at your residence, you were instructed to continue working on the OPRD Field reallocation project and Rooster Rock Investigation. Ms. Frank and her manager, Lisa VanLaanen, made it very clear that this was not disciplinary and that you would need to continue to work on these important projects while duty stationed at home.

“On December 17, 2008, by email to Ms. Frank you affirmed that, ‘I will continue working on the reallocation project and Rooster Rock investigation disciplinary documents at home and will stay contactable between 8am-5pm.’

“On December 23, 2008, Ms. Frank sent you an email asking for a ‘Status Update’ on the reallocation project. You received the email, however, you did not respond.

“On December 26, 2008, Ms. Frank sent you another email asking for a status update. You received the email but, again, you did not respond.

“On December 30, 2008, Ms. Frank sent you another email that reiterated her instructions that while duty stationed at home, you were directed to complete the project and provide updates as requested. The email clearly stated that you were being given a direct order and failure to comply would be viewed as insubordination that may result in discipline. This notice was also ignored.

“On December 31, 2008, you were advised that the DOJ investigation was now complete. The letter stated that nothing you allege or the facts gathered support your complaint that you are being discriminated or harassed, or that you work in a violent environment or are being subject to disrespectful behavior. The matter was considered closed and you were instructed to call your supervisor to arrange a date and time to return to work.

“On Sunday, January 4, 2009, you left a voice mail for Ms. Frank which indicated you would be out of the office on Monday; however, you continued to ignore the request for a project status update.

"On Monday, January 5, 2009, at 9:41 pm, you called Ms. Frank indicating that you would be out of the office this week due to injury. Ms. Frank called you on January 6<sup>th</sup>, 10:30 am, [sic] your home and cell phone numbers, however you did not answer. You returned her call at 4:28 pm. You are aware Ms. Frank works a 7am-400pm work shift. Ms. Frank called you back, from home at 6:00 pm, left you voice mail and indicated she needed to talk to you.

"On January 7, 2009, 8:05 am, you called Ms. Frank. She inquired about your status and if you were okay. You indicated that you were okay. Ms. Frank asked if you had OPRD materials at home. You indicated that you did have OPRD materials at home and that she could come by and pick them up. At that time, you indicated that you had not worked very much on the project, but all the information needed would be in the files. With your approval, Ms. Frank came by your home at 11:15am to pick up the material. You gave her the tape recorder and indicated the Rooster Rock investigation interviews were on the recorder but you did not write the disciplinary actions. You also gave Ms. Frank a garbage bag of files and a thumb-drive containing the Field Reallocation Project information.

"In checking the files, it appears that you opened the thumb drive, however, there is no evidence that you worked while duty stationed at home. The files and materials have not been accessed since December 16, 2008. You were duty stationed at home on December 15, 2008. At the time you were duty stationed at home, Ms. Frank and her supervisor Ms. VanLaanen expressed the importance of continuing to work on the Field Reallocation Project. You also agreed that it was important.

"\* \* \* \* \*

"SUMMARY:

"Jennifer, you received the request for the status update by email. For a time you responded to emails from your supervisor. However, it soon became apparent that you were not going to maintain contact as was part of the duty-station at home expectation.

"Ms. Frank made it clear that you were not on paid time off and that you were expected to complete work assignments.

"It can only be assumed that you consciously decided to ignore your supervisor's directive and not provide information on your progress with

the reallocation project. It also calls into question whether you have worked during your duty-station or have viewed this time away from the office as a paid vacation. In view of your lack of response and failure to provide any information, despite your supervisor's many attempts to work with you, it has been determined that your conduct falls below the directives you have previously been given to maintain a professional and collaborative behavior.

"During your duty station at home and subsequent email communication, it was made very clear that you were to continue to work on the two projects. However, it appears by the status of the materials that you returned to your supervisor that you may have worked on December 16<sup>th</sup>, however there is no evidence of any work product on either project.

"Your role within human resources is to be a consultant, to coach and counsel management and non-management staff on many of the very skills that you are unable or unwilling to exhibit. Your personal interactions with your manager must mirror the very behavior you advise others. This behavior is essential in creating a positive, constructive, collaborative, and productive environment.

"This economic sanction of suspension for one week without pay is a result of your inability or unwillingness to follow a direct order resulting in insubordination and a continuation of unacceptable behavior."

52. Dubrow remained on FMLA leave at the time of the hearing.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The Department violated ORS 240.570(3) when it suspended Dubrow without pay for one week.
3. The Department violated ORS 240.570(3) when it demoted Dubrow.

## Applicable Standards and Case Law

ORS 240.570(3) provides that after completion of trial service, a “management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.” The State has the burden of proving that its discipline did not violate ORS 240.570(3). OAR 115-045-0030(6); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001).

We follow a two-step process in our review of management service employee discipline. We begin by determining whether the employer has proven the charges alleged in the discipline. If we find that the State has proven the charges, we then apply a reasonable employer standard to determine if the State was justified in taking the disciplinary action it did. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied*, (September 2006). We define a reasonable employer as

“one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee’s length of service and service record, and applies the principles of progressive discipline, except where the offense is gross. *Smith v. Department of Transportation*, Case No. MA-4-01 (June 2001); *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8851-8852 (1986). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 (January 1989). In addition, a reasonable employer administers discipline in a timely manner. *Flowers v. Parks and Recreation Department*, Case No. MA-13-93 (March 1994).” *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons*, (June 2004).

A significant factor in our analysis of management service employee discipline is “the extent to which the employer’s trust and confidence in the employee has been harmed and therefore, the extent to which the employee’s capacity to act as a member of the ‘management team’ has been compromised.” *Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984) (footnote omitted). The State may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Morissette v. Children’s Services Division*, Case No. 1410 at 23 (March 1983). The State also need not prove all of the charges upon which it bases its discipline. *Ahlstrom* at 15.

## One-Week Suspension Without Pay

We apply this analysis to evaluate the actions the Department took against Dubrow, beginning with the one week suspension without pay. The Department based this disciplinary action on Dubrow's "inability or unwillingness to follow a direct order resulting in insubordination and a continuation of unacceptable behavior." The facts upon which the suspension was based included Dubrow's failure, while on paid administrative leave, to: (1) maintain contact with the Department, (2) respond to or comply with Frank's December 30 directive to provide a status update, and (3) work on the reallocation project and Rooster Rock investigation. The suspension letter summarizes the reasons for the suspension as follows: "[i]n view of your lack of response and failure to provide any information, despite your supervisor's many attempts to work with you, it has been determined that your conduct falls below the directives you have previously been given to maintain a professional and collaborative behavior."

The Department did not prove the charge that Dubrow was insubordinate because she failed to maintain contact with the Department during her administrative leave. An employee who refuses to obey an order of a supervisor is guilty of insubordination if: (1) the refusal was "knowing, willful, and deliberate – not merely negligent," (2) the order was "explicit and clearly given," (3) the order was both reasonable and related to work, (4) the person giving the order had appropriate authority and the employee understood that, (5) the employee was aware of the consequences of failing to obey the order, and (6) when practicable, the employer gave the employee time to correct potentially insubordinate behavior. *Greenwood* at 32, n 11 (quoting Norman Brand ed., *Discipline and Discharge in Arbitration*, 156-157 (1998)).

Here, the Department never explicitly or clearly ordered Dubrow to be available by e-mail during her leave. To the contrary, the letter establishing the conditions for Dubrow's leave specified that Dubrow was "required to be available by phone between 8:00 a.m. and 5:00 p.m. for Department questions or contacts." The letter made no mention of e-mail and gave Dubrow no instructions about checking her State e-mail account. Accordingly, Dubrow did not violate a supervisor's direct order when she was unavailable by e-mail while on leave.

The Department admits that the letter describing the conditions for Dubrow's leave does not address e-mail. The Department contends that this was unnecessary, however, because Dubrow had worked at home before and had always communicated by e-mail when she did. The State also notes that Dubrow sent a number of e-mails to Frank during the first few days of her leave. According to the Department, Dubrow knew (or should have known) that she must maintain contact through the State e-mail system while on leave. We disagree.

An employee is guilty of insubordination only if the employee violates a supervisor's clear and explicit order. Here, Dubrow's supervisor issued no such order. Even if we agree with the Department that Dubrow should have known that she was required to maintain e-mail contact with Frank, Dubrow's failure to do so is at most merely negligent. An employee whose failure to comply with a supervisor's order results from negligence is not guilty of insubordination. *See Juono v. Department of Veterans Affairs*, Case No. 1353 at 10 (1981) (an employee who was "grossly negligent" in failing to observe his supervisor's directions and the office attendance rules did not willfully defy authority and was not insubordinate).

The Department also failed to prove the charge that Dubrow was insubordinate when she did not obey Frank's December 30 directive to provide an update on the status of work on the reallocation project. There is no dispute that Dubrow did not respond to Frank's December 30 e-mail. However, as discussed above, an employee is guilty of insubordination only if the employee's refusal to comply with an order is knowing and willful. Since Dubrow never received the e-mail directing her to update Frank about her work on the reallocation project, she was unaware that she was required to give Frank this information. Accordingly, Dubrow did not knowingly or deliberately fail to respond to Frank and her actions were not insubordinate.

The Department proved charges that Dubrow engaged in unacceptable behavior<sup>11</sup> when she failed to comply with the Department's directive to work on the reallocation project and the Rooster Rock disciplinary investigation. Frank explicitly ordered Dubrow to work on the reallocation and Rooster Rock projects on December 15, and Dubrow acknowledged and agreed to comply with this order. In an e-mail sent on December 16 or 17, 2008, Dubrow told Frank that regardless of her objections to her paid leave, she would "continue working on the reallocation project and Rooster Rock disciplinary documents at home \* \* \*." (Finding of Fact 35(D)). Although the record is unclear regarding the nature and extent of Dubrow's work on these projects, it appears that Dubrow did little work while on leave. Dubrow admitted that she often could not work because she was depressed and stressed, and suffering from migraine headaches. In addition, the last date on which Dubrow made any changes to computer files for the Rooster Rock and reallocation assignments was December 16, a day after Dubrow began her paid administrative leave on December 15.

---

<sup>11</sup>The Department also charged Dubrow with "unacceptable behavior" in failing to maintain e-mail contact with the Department and failing to comply with Frank's directive to provide her with updates on the reallocation project. The only reason cited for finding these actions unacceptable was Dubrow's alleged insubordination. Because we have held that Dubrow was not insubordinate in regard to these matters, we also hold that she did not engage in "unacceptable behavior" in regard to her e-mail contact with the Department.

Dubrow's failure to obey Frank's order to work on the reallocation and Rooster Rock projects does not constitute insubordination, however. As discussed above, a critical element in the definition of insubordination is warning: an employee's refusal to obey an order constitutes insubordination only if the employer warned the employee of the consequences of disobedience. Because Frank never told Dubrow that she could be subjected to discipline if she did not comply with Frank's directive to work on the reallocation and Rooster Rock projects, Dubrow's refusal to perform this work was not insubordinate.

Although Dubrow's failure to work on the two projects she was assigned was not insubordinate, her actions nevertheless constituted unacceptable behavior for a management service employee, as charged by the Department. Dubrow knew she was solely responsible for the two projects. She was aware that the projects were important, and understood that they needed to be completed quickly. As a management service employee, the Department reasonably expected that Dubrow would demonstrate both the willingness and initiative to complete assigned work or notify her supervisor if she could not. Dubrow's failure to do either of these things damaged the Department's trust and confidence in her as a member of the management team. *See Patrick v. Department of Agriculture*, Case No. MA-2-91 at 13 (June 1991) (the State is entitled to expect that a management service employee will take the initiative to complete assigned work).

Dubrow asserts that her failure to work on the two projects should be excused because of the depression, anger, and stress she experienced because she had been placed on leave. We disagree. If Dubrow was unable to work on the two projects because of physical or mental problems, she should, at the least, have notified the Department. That would allow the Department to assign someone else to complete these important and time-sensitive projects. The Department could reasonably expect that Dubrow, as a management service employee and senior member of the HR team, would understand the importance of telling her supervisor that she could not complete work on an important project. In the May 30 reprimand, Dubrow was instructed to notify her supervisor before the start of her shift if she was ill.

Dubrow also argues that we should find that the charges the Department brought against her were a pretext, and that the Department really disciplined her because she filed a complaint against her co-workers. In support of her assertion, Dubrow cites a number of factors. Dubrow notes that the Department's first suspension letter, sent on January 6, did not give her adequate due process because it offered her no opportunity

to respond to the discipline before it was imposed.<sup>12</sup> In addition, Dubrow also contends that a number of other Department actions demonstrate that the actual reason for her discipline was retaliation: the Department's decision to place Dubrow, a complainant, on administrative leave and require her to work at home; the "specious" reasons provided for the discipline; and the timing of the discipline in relation to the filing of the complaint. Dubrow urges this Board to find that the discipline was not issued in good faith for cause but as part of a pattern of unreasonable and retaliatory conduct.

We are not convinced by Dubrow's arguments. The Department's reasons for suspending Dubrow were not "specious." As discussed above, Frank reasonably expected Dubrow to complete the work assigned to her (or tell Frank if she could not). Frank's concern about Dubrow's failure to work on the assignments was understandable. Although the Department did not prove all of the charges upon which the suspension was based, it need not prove all the charges alleged in support of a disciplinary action. *Ahlstrom* at 14. The Department proved one of the charges it made—that Dubrow did not work on the assigned reallocation and Rooster Rock projects during her leave. Nor do we conclude that Frank's misunderstanding—that Dubrow would be available by e-mail during her leave—constitutes proof that Frank suspended Dubrow in retaliation for the complaints she made. Frank's belief that Dubrow would maintain e-mail contact appears to be the result of honest confusion about how Dubrow would communicate with her; there is no evidence to suggest that it resulted from any desire to retaliate against Dubrow.

The Department's failure in its January 6, 2009 letter to provide Dubrow adequate due process also does not support a finding that the reasons given for the discipline were pretextual. Frank certainly acted hastily in suspending Dubrow. The Department then corrected its failure to provide Dubrow with adequate due process by rescinding the initial suspension, and issuing another suspension that gave Dubrow an opportunity for a pre-disciplinary hearing. The Department's actions were sufficient to cure any defects in the January 6 discipline. *Payne v. Department of Commerce, Building Codes Division*, Cases No. 1399/1408 at 7 (1982) (although an initial effort to discharge an employee was procedurally defective, this defect did not cause any "incurable detriment" to the employer's second, corrected disciplinary action).

---

<sup>12</sup> If a proposed disciplinary action would deprive a management service employee of a property interest, such as salary, the employee is entitled to notification of the charges and the sanctions being considered, and an informal opportunity to refute the charges before the employer makes the final decision to discipline the employee. *Helper v. Children's Service Division*, Case No. MA-1-91 at 22 (February 1992).

The only evidence that might suggest a retaliatory motive for the suspension is the timing of the Department's action: the January 6 letter suspending Dubrow was sent approximately one week after the Department determined her complaint had no merit. However, as discussed above, the Department proved one of the charges upon which it based the suspension: Dubrow's unacceptable behavior in failing to complete assigned work. Because the Department demonstrated a legitimate reason for disciplining Dubrow, we cannot conclude that its motives were pretextual solely because of the timing of the discipline.

It is not surprising that Dubrow felt unfairly treated because of the Department's unprecedented action in placing her on administrative leave and requiring her to work from home.<sup>13</sup> We also question the wisdom of the Department's failure to talk with Dubrow about less onerous alternatives prior to placing her on leave. In addition, the Department incorrectly assumed that Dubrow would willingly work at home, since she had done so in the past. However, we do not evaluate the Department's decision to determine if it was the most appropriate one that could have been made under the circumstances. Instead, we determine only whether the Department put Dubrow on leave because it sought to retaliate against her for complaining about her co-workers. We conclude that it did not. The Department was faced with an unusual situation; Dubrow had complained about virtually every member of the HR staff, employees who were part of a team with which Dubrow was expected to work on a daily basis. The Department needed to balance its desire to protect Dubrow against its need to maintain its HR operations. Given this situation, the Department had a rational basis for choosing to put Dubrow on paid leave.<sup>14</sup>

---

<sup>13</sup>Dubrow did not appeal the Department's decision to place her on administrative leave and, even if she had, we do not have jurisdiction to consider such an appeal. ORS 240.570(3).

<sup>14</sup>In support of her contention that the Department placed her on paid leave in retaliation for the complaint she filed, Dubrow cites *Burlington Northern & Santa Fe Railway Company v. Sheila White*, 548 US 53, (2006). In that case, the employer reassigned and then suspended an employee who complained about discrimination to the Equal Economic Opportunity Commission (EEOC). The Court held that the employer's actions were unlawful retaliation under the provisions of Title VII of the Civil Rights Act of 1964, 42 USCS §2000e-3(a).

Assuming, without deciding, that Dubrow's complaints about her co-workers constitute complaints about "unlawful employment practices" comparable to the EEOC complaints the employee made in *Burlington Northern*, the holding in that case does not apply to the facts here. In *Burlington Northern*, the parties agreed that the employer's actions in reassigning and suspending the employee directly resulted from her complaint to the EEOC. The only issue on

Because the Department proved one of the charges upon which the suspension was based, we now decide whether the level of discipline imposed was appropriate. We hold that a one-week suspension is disproportionate to the offense Dubrow committed. The Department originally imposed the one-week suspension for three charges. Only one of these charges was proven—Dubrow’s “unacceptable behavior” in failing to complete assigned work. The Department did not carry its burden to demonstrate the more serious charges of insubordination. In addition, while it is undisputed that Dubrow did little work during her paid administrative leave, it is unclear exactly how much work she did (or did not) do.

Mitigating circumstances also existed in this case. Dubrow was normally a hard worker, who willingly took on more than her share of work and provided good service to her clients. Her skills were reflected in her most recent evaluation in which the Department rated her as meeting or exceeding expectations in all categories. We also find it unusual that Frank never called Dubrow during her leave, even after Dubrow did not respond to several e-mails. While Dubrow was not a long-term Department employee and had previously received a reprimand, the reprimand was for conduct unrelated to the conduct upon which her suspension was based. This was the first time that Dubrow failed to complete assigned work. Given these circumstances, an objectively reasonable employer would have issued the mildest form of discipline—a written reprimand.

### Demotion

We next consider the Department’s actions in demoting Dubrow for being “unable or unwilling to fully and faithfully perform the duties of the position satisfactorily” under ORS 240.570(3). The Department based its action on Dubrow’s behavior at the December 4 team meeting. The Department alleged that Dubrow attacked her co-workers at the meeting, and that her actions were “hurtful” and “destructive.” The Department asserted that her behavior was inappropriate for one holding the type of senior leadership position that Dubrow held. In addition, the Department charged Dubrow with failing to take responsibility for her negative behavior at the meeting and the effect of her behavior on other HR team members.

---

appeal was whether these actions met the definition of retaliation under Title VII. Here, we hold the paid leave was not in retaliation for Dubrow’s complaint. To the contrary, we conclude that the Department had valid reason to place Dubrow on paid leave. By placing Dubrow on leave, the Department removed Dubrow from the alleged hostile environment. In addition, it was more feasible to remove Dubrow from the office rather than assign numerous other department employees to work at home.

We conclude that the Department proved the charges upon which the demotion is based. Dubrow became so upset and angry during the meeting that her face turned red. In discussing her concerns about her workload at the meeting, Dubrow spoke critically and publically about her fellow team members' skills and abilities, and refused to stop even when it became obvious that she was upsetting her co-workers and supervisor. Dubrow complained bitterly about the unfair workload she was assigned, and angrily refused offers of help from her colleagues. Her behavior created a tense and negative environment, an environment which harmed her relationship with other team members and impeded her ability to work effectively with them.

Dubrow was certainly entitled to express her opinions about the subject of the December 4 meeting—work assignments for the HR team. The manner in which she did so, however, was inappropriate. We understand why Dubrow was upset. She carried a significant portion of the workload and felt that all of her attempts to obtain relief from or assistance with her workload had failed. Even though her frustration may have been justified, however, the way in which she expressed herself was not. By angering and upsetting her colleagues at the December 4 meeting, Dubrow failed to heed the directives she had been given when she was reprimanded in May 2008—to speak respectfully to her team members and work “positively and cooperatively” with them.

Dubrow could have expressed her dissatisfaction about her workload in a far more constructive way. She could have talked with Frank about her assignment before the meeting. She chose not to do so. By challenging and criticizing Frank's assignments at a team meeting, she made it difficult for Frank to resolve any problems the assignments created.

After the December 4 meeting, Dubrow refused to admit that her behavior damaged her working relationship with her colleagues. Although Dubrow apologized to Frank after the meeting, she did not appear to understand then, or even at the time of the hearing, that the problems she created resulted from the manner in which she expressed her opinions and the way in which she treated her co-workers. Dubrow may genuinely have believed that she treated her co-workers appropriately and may also have believed that she was the victim of inappropriate treatment by other HR team members. As far as the events relevant to the demotion are concerned, however, her beliefs were not correct.

Dubrow asserts that she was disciplined for failing to serve as an adequate counselor, mentor, or leader for other employees. According to Dubrow, this was an inappropriate reason for discipline because these duties were not included in her job

description. We disagree. Dubrow knew that mentoring and counseling was work she was expected to do. In its May 2008 reprimand, the Department told Dubrow that her role as an HR team member “is to be a consultant, to coach and counsel management and non-management staff.” (Finding of Fact 15.) Although Dubrow disagreed with some aspects of this reprimand, she never challenged the Department’s description of her role.

We also reject Dubrow’s argument that the Department demoted her in retaliation for filing her complaint. Dubrow argues that Frank sent her a “friendly” e-mail soon after the December 4 meeting, and that this shows that Frank was not upset about the meeting. According to Dubrow, these facts demonstrate that the meeting was not the real motivation for the demotion. Just as we did with the suspension, we conclude that the reasons for the demotion were not specious. Dubrow acknowledged that her problems with other team members were both long term and ongoing. These problems resulted in Dubrow receiving a letter of reprimand in May 2008. Nor is there any dispute that the December 4 team meeting went badly and that other team members were upset by Dubrow’s behavior. Frank discussed these problems with Dubrow after the meeting. Other employees told Frank that they were upset by Dubrow’s behavior after Frank sent Dubrow the “friendly” e-mail. Thus, the evidence does not support Dubrow’s contention that the Department demoted Dubrow because she complained about her co-workers.

Because we conclude that the Department proved the charges upon which it based the demotion, we now determine whether the level of discipline imposed was reasonable. We conclude it was not. The Department’s demotion was contrary to one important requirement of the reasonable employer test—that an employer consider principles of progressive discipline in determining an appropriate sanction. A reasonable employer generally uses progressive discipline, except when the employee’s offense is gross or where the employee’s behavior cannot be improved through progressive measures. *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (November 1994). Discipline is progressive if it involves “corrective measures that put the employee on notice that further misconduct may result in the discipline ultimately imposed and that give the employee a reasonable opportunity to modify his behavior.” *Oregon School Employees Association, Chapter 89 v. Rainier School District 13*, Case No. UP-85-85, 9 PECBR 9254, 9279 (1986) (footnote omitted). Consistent with these principles, a reasonable employer will impose escalating penalties on an employee who cannot or will not change.

Here, the Department reprimanded Dubrow in May 2008 for negative interactions with her co-workers. The reprimand included no warning that any future misconduct could result in more severe disciplinary sanctions. Dubrow’s behavior improved for a while, but then worsened at the December 4 meeting. As a result, the Department demoted her to a new, lower-paying position; by so doing, the Department imposed a pay

reduction of indeterminate duration on Dubrow. The Department's actions are inconsistent with the principles of progressive discipline. By moving from the mildest form of discipline (a written reprimand) to a harsh economic sanction, the Department failed to utilize corrective and progressive disciplinary measures that notified Dubrow that further misconduct could result in the discipline ultimately imposed. The conduct upon which the demotion was based—Dubrow's behavior at the December 4 meeting—was not so gross as to excuse the Department's failure to use progressive discipline. Negative and inappropriate interactions among HR team members other than Dubrow was a relatively long-standing problem in the Department. Nor does the evidence demonstrate that Dubrow was incapable of changing. After the Department reprimanded Dubrow for her failure to work effectively, productively, and collaboratively with her colleagues, Dubrow willingly worked with her team members and a consultant to improve matters.

We considered circumstances similar to those presented here in *Crockett v. Executive Department, Intergovernmental Relations Division, Community Development Section*, Case No. MA-4/11/14/16-85 (June 1988). There, we concluded that a one-step, one-month pay reduction was appropriate discipline after a management service employee had been reprimanded "at least in part" for similar conduct. *Crockett* at 32. We reached a similar result in *Hopkins v. Mental Health and Developmental Disability Services Division*, Case No. MA-6/23-92 (July 1993), where we considered the employer's imposition of a two-month pay reduction on a management service employee who allowed a client to leave a facility without authorization and also permitted an unauthorized visitor in the facility during work hours. We noted that these actions came after the employee had been previously reprimanded for exercising poor judgment. We upheld the temporary pay reduction, concluding that "[t]he Division acted reasonably in imposing a temporary pay reduction as the next level of discipline, after a reprimand, as part of its progressive discipline of Hopkins [the appellant]." *Hopkins* at 12-13.

Here, the Department imposed an economic sanction of indeterminate duration after it reprimanded Dubrow for similar conduct.<sup>15</sup> We conclude, as we did in *Crockett* and *Hopkins*, that a temporary economic sanction is appropriate for Dubrow's second incident of serious negative behavior with her co-workers. We will order the Department to rescind its demotion and, instead, temporarily demote Dubrow to an HRA 2 position for a period of two months.

---

<sup>15</sup>We note that the January suspension, which we have reduced to a reprimand, was for conduct unrelated to Dubrow's interactions with her co-workers.

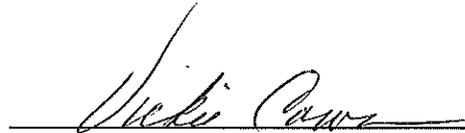
ORDER

1. Dubrow's one-week suspension without pay is set aside. The Department shall immediately make Dubrow whole for any loss of pay and benefits caused by the suspension, remove the letter of suspension, and substitute a letter of reprimand in its place.

2. Dubrow's demotion to an HRA 2 position is set aside. The Department shall temporarily demote Dubrow to an HRA 2 position for a period of two months. At the end of the two month period, the Department shall restore Dubrow to her HRA 3 position. The Department shall make Dubrow whole for any wages and benefits she would have received if she had continued working in her HRA 3 position, with interest at the legal rate, for the period beginning on the date her two month demotion ends and ending on the date the Department restores her to her HRA 3 position.<sup>16</sup>

DATED this 3 day of May, 2010.

  
\_\_\_\_\_  
Paul B. Gamson, Chair

  
\_\_\_\_\_  
Vickie Cowan, Board Member

  
\_\_\_\_\_  
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

---

<sup>16</sup>The amount of back pay and benefits will be calculated according to the formula we adopted in *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8853 n 28 (1986).